The Role of the State Attorney General in Preventing and Punishing Hate Crimes Through Civil Prosecution: Positive Experiences and Possible First Amendment Potholes

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I. Introduction

On July 3, 2006, Lewiston, Maine resident Brent Matthews threw a pig's head—considered dirty in Islamic culture—into the town's only mosque, frequented primarily by Somali refugees.1 Because of Matthews’ action, which he considered a “joke,” members of the mosque were forced to clean the desecrated area seven times as required by Islamic practices, attendance at the mosque decreased, and some members said they feared physical harm.2 Subsequent to his arrest Matthews claimed that he had asked a member of the Lewiston Police Department before what charges he could face, and then officer told Matthews that he could face only littering and improper disposal of body parts charges.3 Members of the mosque claim that police officers did not take the incident seriously and “just laughed” when they saw the pig’s head.4 Matthews also said that the police treated the incident as a joke, one even going so far as to say “I wish I had thought of that.”5

While the Lewiston Police Department may share Matthews sense of humor, the Maine Attorney General's Office did not. Two weeks after the incident Maine Attorney General Steven Rowe filed a civil action against Matthews under the Maine Civil Rights Act, asking the court to order Matthews not to have any contact with the mosque or its members.6 In a press release announcing Matthews' prosecution, Attorney General Rowe opined that “[a]s a civil society and one governed by the rule of law, it is our obligation to take the legal steps necessary to make sure that Maine people who practice Islam and people of all other faiths feel completely free and safe to worship without violent interference from others.”7

Maine is one of only eight states that has given its Attorney General the authority to seek a civil remedy for a violation of a citizen's civil rights. The seven other states which have delegated this power to their attorneys general are California, Massachusetts, New Hampshire, New Jersey, Pennsylvania, West Virginia and Vermont. In these jurisdictions, the state attorney general may seek an array of civil remedies, including injunctions, damages, attorney's fees and other equitable relief against a person who has committed a hate crime, without regard to concurrent criminal prosecutions or private civil claims arising upon the same incident.8

What role should the state attorney general have in policing civil rights violations? How broad should their powers be and what justifies their intervention? This article looks at the experiences of these eight states and explores whether this is a model that other jurisdictions

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1 See Max Mogensen, Pig’s Head Thrown Into Mosque During Prayers, Sun Journal, July 4, 2006.
3 See Christopher Williams, Pig's Head Suspect: I Asked Cop, Sun Journal, August 8, 2006. However, the police officer cited by Matthews has disputed Matthews depiction of their conversation and has said that he told Matthews he could possibly be guilty of a hate crime and advised Matthews not to do anything with the pig's head.
4 Mogensen, supra note 1.
5 Williams, supra note 3. A police spokesperson said that the Lewiston Police Department was not treating the issue lightly.
7 Id.
8 Although there are many different names for a crime motivated by the hatred of a characteristic of the victim, such as “bias-motivated crime” and “civil rights crime,” this article uses the term “hate crime” to connote these crimes.
should follow. Part II discusses the authority of the state attorney general when acting as *parens patriae* of its citizens. Part III examines the general characteristics of hate crimes and discusses the problems inherent in their prosecution and prevention. It then looks in depth at the laws of the eight states and discusses how their attorneys general’s offices have used—or not used—their authority. Part IV attempts to reconcile the eight states' experiences with exercising this type of authority and analyzes the trends that emerge. Part V focuses on the law of punishing hate crimes and identifies possible constitutional issues, paying special attention to the permissibility of punishing hate speech and the constitutionality of injunctions as a restraint on speech. Finally, Part VI recommends a course of action for other states interested in adopting similar legislation.

II. Authority of the State Attorney General

In America, every state has an attorney general who is designated that state's Chief Legal Officer. The specific duties and responsibilities of the Attorney General are often amorphous because state law provides only that the Attorney General may “perform duties prescribed as law” or exercise powers given to the office in common law. In some states, the attorney general has the statutory authority to bring “consumer protection, environmental, civil rights, civil fraud, securities, and antitrust actions; some offices are also charged with maintaining oversight over public lands and charitable trusts.” In addition, many attorneys general play a role in enforcing criminal laws by either prosecuting criminals directly or supervising law enforcement officials. Most attorneys general also provide legal services to the governor and state agencies. More generally, some states have entrusted their attorneys general simply with the broad common law power of *parens patriae*—meaning parent of the state.

In order for a state attorney general to assert standing under the doctrine of *parens patriae*, “the State must assert an injury to what has been characterized as a quasi-sovereign interest, which is a judicial construct that does not lend itself to a simple or exact definition.” Although the Supreme Court declined to define quasi-sovereign interest in *Alfred L. Snapp & Son, Inc.*, the Court observed that there are two categories of qualifying interests that emerge from case law. “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.” In addition to a quasi-sovereign interest, the Court held that a state “must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.” The Court's language in *Snapp* seems to imply that there is some type of numerosity requirement to be met before the attorney general can act as *parens patriae*, in that the office may not represent a private party merely to vindicate that party's private interest. The Court, however, did not

11 See Marshall, supra note 9, at 2448.
12 See *id*.
14 See Marshall, supra note 9, at 2448.
16 *Id*.
17 *Id* at 607.
create a specific requirement of what proportion of the population must be affected, but it articulated some guidelines.

One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.\(^{18}\)

Interpreting this language the Court's requirement turns on the type of injury, rather than a requirement that a certain number of citizens be affected. Therefore, even if one person commits a crime against one other person, the attorney general may act under his authority of *parens patriae* as long as the crime affects the community.

On balance, because the state attorney general's role is largely undefined and subject only to the very loose constraints of the doctrine of *parens patriae*, states are free to expand and experiment with the attorney general's authority.

### III. The Role of the State Attorney General in Civil Rights Violations

#### A. State Civil Rights or “Hate Crimes” Laws Generally

Though public attention to hate crimes ebbs and wanes, the number of hate crimes remains high. Between July 2000 and December 2003, there were an annual average of 191,000 hate crimes incidents involving one or more persons in the United States—about three percent of all crimes reported to the National Crime Victimization Survey (NCVS).\(^{19}\) Of these 191,000 incidents, an average of about forty-four percent were reported to police, who took action in eighty-five percent of reported incidents.\(^{20}\) Eighty-four percent of incidents were accompanied by a violent crime, such as robbery or assault, and the remaining fourteen percent were property crimes, such as burglary or theft.\(^{21}\) Breaking down hate crimes into categories by type of bias, fifty-five percent were motivated by race; thirty-one percent were motivated by association;\(^{22}\)

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18. *Id.*
19. See Bureau of Justice Statistics, *Hate Crimes Reported by Victims and Police* (Department of Justice, Nov. 2005), 1 [hereinafter BJS]. BJS data come from the FBI Uniform Crime Reporting Program (UCR), which compiles crimes reported by law enforcement agencies, and the NCVS, which collects data from interviews with approximately 77,000 people nationwide about their hate crime experiences. The FBI annually issues its own report of Hate Crime Statistics compiled from UCR data. Because the FBI report contains only data reported voluntarily by law enforcement agencies, its numbers tend to be far lower than BJS. For example in 2003, the FBI reported a total of 7,489 hate crime incidents involving 9,100 victims. See Federal Bureau of Investigations, *Hate Crimes Statistics 2003* 5 (November 2004), available at: http://www.fbi.gov/ucr/03hc.pdf. However, this number is comprised of data from agencies covering only eighty-three percent of the population, and to be included in the survey agencies need only report data from one quarter of the calendar year. *Id.* at 1, 4. Thus, even the reported data covering eighty-three percent of the population could be off by as much as seventy-five percent. Because of this ambiguity and because BJS reports indicate that less than fifty percent of hate crimes are actually reported to law enforcement, this article uses BJS data. It is worth noting, however, that BJS data likely overstate the number of hate crimes incidents because the NCVS uses information from non-legally trained persons, who may report incidents that—in reality—do not amount to a criminal act. The difficulty in determining the actual number of hate crime incidents is one of the byproducts of the difficulty in identifying hate crimes generally, discussed in more detail below.
20. *Id.*
21. *Id.*
22. Hate crimes motivated by association are those where the victim is targeted because of her association with someone who has a certain characteristic, such as a multiracial couple.
twenty-nine percent were motivated by ethnicity; eighteen percent were motivated by sexual orientation; fourteen percent were motivated by another perceived characteristic; thirteen percent were motivated by religion; and eleven percent were motivated by disability.\footnote{BJS, supra note 19, at 3. The FBI UCR reports similar, although not identical, data. In 2003, around fifty percent of hate crimes were motivated by racial bias, eighteen percent by religious bias, sixteen percent by sexual-orientation bias, fourteen percent by ethnicity/national origin bias, and less than one percent because of disability. See Federal Bureau of Investigations, \textit{Hate Crimes Statistics 2003}, at 5.}

In order to address the problem of hate crimes, nearly every state has enacted some form of hate crimes law, most of which are based on model legislation drafted by the Anti-Defamation League (ADL).\footnote{See Robert J. Kelly, Jess Maghan and Woodrow Tennant, \textit{“Hate Crimes: Victimizing the Stigmatized”} in Bias Crimes: American Law Enforcement and Legal Responses, ed. Robert J. Kelly, 65, Office of International Criminal Justice: The University of Illinois at Chicago, 1993, 45-7. The three states that still do not have a hate crime statute are Nebraska, Utah and Wyoming.} The ADL’s approach treats hate crimes as a “penalty enhancement” rather than an independent crime.\footnote{Anti-Defamation League, \textit{Hate Crimes Law: A Comprehensive Guide}, 2 (1994) [hereinafter ADL].} Expressions of hateful speech, without more, are not criminalized. Hate crimes instead occur when an individual commits a predicate illegal offense, such as assault, harassment or vandalism, coupled with a motivation, at least in part, of underlying bias.\footnote{See Jeannine Bell, \textit{Policing Hatred: Law Enforcement, Civil Rights and Hate Crime} (New York University Press, 2002), 12.} There are three main justifications offered for treating hate crimes more harshly than other forms of crime. First, hate crimes have especially negative effects on the individual because their victimization is tied up with the victim's identity, which can create feelings of anger and vulnerability.\footnote{See James Garofolo & Susan E. Martin, \textit{The Law Enforcement Response to Bias-Motivated Crimes}, in Bias Crimes: American Law Enforcement and Legal Responses, ed. Robert J. Kelly, 65, Office of International Criminal Justice: The University of Illinois at Chicago, 1993, 65.} Second, hate crimes have especially negative effects on the community as a whole because they can heighten hostilities between groups—perhaps leading to violence—as well as increase fear and distrust generally.\footnote{Id. at 66.} Third, “the expression of bias is an element, that is, at least analytically, severable from the crime itself....the expression of bias has a meaning of its own that can produce negative effects regardless of the seriousness of the associated crime.”\footnote{Id. at 70.}

Whether a crime is motivated by hate is normally determined by the police officer investigating the underlying crime, which makes hate crimes unusual in that motivation is a required element.\footnote{Id.} Establishing a bias motive is complicated by the fact that police officers must determine why a crime has occurred, in addition to determining the facts of the crime. This determination necessarily involves interpreting external actions as evidence of internal motivation. In making this determination, officials place a great amount of weight on what was said and what symbols were used, such as a swastika or a burning cross.\footnote{Id. at 70.} These aren't the only factors, however. Officials may look at “the victim's perceptions, the victim's identity (in the sense of whether the victim is publicly recognized as a spokesperson for his or her group), whether the incident is part of a pattern of acts, and when the incident occurs (e.g., on holidays with special religious, racial or ethnic significance).”\footnote{Id.} In the most recent BJS Report, ninety-nine percent of victims cited “negative comments, hurtful words, [and] abusive language” as
evidence of underlying bias.\textsuperscript{33} Victims also cited evidence of hate symbols and police confirmations in eight percent of cases.\textsuperscript{34} As a practical matter, without concrete and explicit example of bias or hatred, it may be difficult for police officers to recognize hate crimes and for attorney generals and prosecutors to meet their burden of proof in court.

States choose to pursue civil remedies for hate crimes for a variety of reasons.\textsuperscript{35} First, the burden of proof is less onerous for civil claims—usually a preponderance of the evidence, compared with beyond a reasonable doubt.\textsuperscript{36} Second, a civil injunction is typically adjudicated more quickly than a criminal case.\textsuperscript{37} Third, juveniles are subject to civil injunctions to a greater extent that they would be subject to criminal sanctions.\textsuperscript{38} Lastly, civil injunctions can be permanent, while stay away orders normally only last for short periods of time.\textsuperscript{39}

In addition to the general advantages of civil prosecutions, there are many benefits to states that allow their attorney general to bring suit on the victims' behalf for hate crimes. First, the victim often has fewer resources to draw from, which means that claims for civil injunctions are often not filed where they may be appropriate.\textsuperscript{40} Second, in some states the attorney general is held to a lesser requirement for standing than private individuals, having to prove merely a “public interest.”\textsuperscript{41} Lastly, there may be greater deterrent effects with the state's involvement because it sends a message that the state takes civil rights violations seriously.\textsuperscript{42}

\textit{B. State Civil Rights Laws that Give the State Attorney General a Cause of Action}

\textbf{i. California}

\textbf{a) Law}

In 1976, California enacted the Ralph Civil Rights Act, which provides that all persons “have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic..., or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.”\textsuperscript{43} The characteristics protected by the Act are not listed in the statute, but the California Legislature declared in its findings that the Act protected hate crime based on “race, color, religion, or sex, among other things.”\textsuperscript{44} When a person's civil rights have been violated under the Act, the California Attorney General, district attorney or city attorney may bring a civil action for injunctive and other equitable relief “in order to protect the peaceable exercise or enjoyment of the right or rights secured [by the Constitution or the laws of

\begin{footnotes}
\item[33] BJS, \textit{supra} note 19, at 3.
\item[34] \textit{Id.} Note that the percentages add up to more than 100\% because victims included more than one motivation or evidence of motivation.
\item[35] See ADL, \textit{supra} note 25, at 419.
\item[36] \textit{Id.} Note that of the eight states studied in the paper, only the New Hampshire Civil Rights Act requires the state to meet a clear and convincing burden of proof. See notes, \textit{infra}, 105-06.
\item[37] See ADL, \textit{supra} note 25, at 419.
\item[38] See \textit{id}.
\item[39] See \textit{id.} at 420.
\item[40] \textit{Id.} at 419.
\item[41] \textit{Id}.
\item[42] \textit{Id}.
\item[43] Cal Civ Code § 51.7 (2006).
\item[44] Stats 2000, ch. 98, Section 1.
\end{footnotes}
In 2001, the California Legislature passed an amendment to Section 52.1 that provides that the Attorney General, district attorney or city attorney may seek a civil penalty of $25,000, which is assessed individually against each person violating the law and awarded to each person whose rights have been violated. This amendment was authored by the California Attorney General's Office based on the inadequacy of existing law to incentivize victims to report hate crimes. The Attorney General testified that despite his office's efforts to inform the public about the Attorney General's ability to bring a hate crime claim, they were not “very successful in getting requests for assistance” even though they knew that hate crimes were occurring. The Attorney General believed that by adding a $25,000 penalty and reward to the remedies the government could seek, more people would report hate crimes to the Office—as well as deterring perpetrators that would face a fine of $25,000. In addition, the Attorney General and the Anti-Defamation League testified that the alternative of filing a private civil claim was inadequate because few attorneys were willing to take these cases on a contingency basis.

The Anti-Defamation League said that “their four California offices receive hundreds of calls from victims of discrimination, intimidation, and hate-motivated violence, and that those callers are regularly channeled to the Attorney General or district or city attorney for assistance in obtaining injunctions” because victims could not find private attorneys.

b) Enforcement

Although the California Attorney General's Office lobbied successfully for the 2001 amendments, the Office rarely, if ever, civilly prosecutes hate crimes itself. Unlike other states, the California Attorney General has concurrent jurisdiction and direct supervision over county and district attorneys and sheriffs. Hate crimes are investigated and prosecuted by these agencies under the guidance of the Attorney General's Office, rather than the Office bringing cases itself. In addition, the Criminal Justice Statistics Center compiles statistics tracking the number of criminal hate crime prosecutions, but neither it nor the Attorney General's Office track the number of civil prosecutions. In the last five years, the Attorney General's Office has been involved in only two reported cases involving Section 52.1, both times defending state agencies or employees accused of hate crimes. Rather than prosecute hate crimes itself, the Attorney

46 Id.
47 California Senate Committee on Judiciary, Committee Analysis of AB 587, at 4 (July 3, 2001).
48 Id.
49 Id.
50 Id.
51 Telephone Interview with Louis Verduzo, Assistant California Attorney General (Jan 3, 2007) [hereinafter Verduzo].
53 See id.
54 See Verduzo, supra note 51.
General’s office publicizes information about hate crimes and works on improving the government’s policy.

ii. Maine

a) Law

The Maine Civil Rights Act was enacted in 1989 in direct response to an increase in hate group-related activity.\(^{57}\) Modeled on, and nearly identical to, the Massachusetts Civil Rights Act, the Maine Civil Rights Act provides that:

Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured.\(^{58}\)

In 1993 the Maine Legislature passed an amendment to the Civil Rights Act that specified the categories of people specifically guaranteed to be free from violations of their civil rights.\(^{59}\) As amended, the Act protects people from violence or property damage motivated by their “race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation.”\(^{60}\) When a hate crime occurs, the statute authorizes the Maine Attorney General's Office to file a suit for an injunction, a civil penalty of up to $5,000, and reimbursement of attorneys' fees to the Office.\(^{61}\) A perpetrator who violates an injunction or consent decree issued under this section is guilty of a class D crime—punishable by up to a year in jail.\(^{62}\)

b) Enforcement

The Maine Attorney General's Office vigorously and frequently prosecutes hate crimes. Every year, the Office receives about 250 reports of possible hate crimes and brings suit in about ten to fifteen cases.\(^{63}\) Since the law was enacted, the Office has successfully received 275 injunctions, only seven of which have ever been violated.\(^{64}\) The Office has never lost a case against the alleged perpetrator of a hate crime—perhaps because they are selective in which

\(^{58}\) 5 M.R.S. § 468(1) (2005).
\(^{60}\) 5 M.R.S. § 4684-A (2005).
\(^{61}\) Id.
\(^{62}\) See Parr, supra note 57, at 193.
\(^{63}\) Telephone Interview with Thom Harnett, Assistant Maine Attorney General (Dec. 22, 2006) [hereinafter Harnett].
\(^{64}\) Id.
cases they prosecute and only bring cases that they are reasonably sure they can prove. The average perpetrator of a hate crime in Maine is a white male between the ages of fourteen and seventeen, and the most common type of hate crime is motivated by race or color, followed by sexual orientation. Since September 11, 2001, the Office has noted an increasing number of hate crimes directed towards people perceived to be Muslim or from the Middle East.

When the Attorney General's Office civilly prosecutes a hate crime, the parties are likely to agree on a resolution, which is encapsulated in a consent decree, rather than proceed through the adjudicatory process. For example, between August 28, 1992 and October 21, 1999, the Office brought eighty-six formal actions. From these actions, 135 defendants entered into consent decrees with the Office; eight permanent injunctions were issued; three default judgments were granted; and one order/decision was issued. Many perpetrators choose not to retain private counsel during this process and proceed pro se. Consent decrees are essentially contractual agreements between the defendants and the State where the defendant agrees to a course of conduct/non-conduct. Consent decrees normally last the lifetime of the perpetrator and often contain boilerplate language that prohibits the perpetrator from coming within X number of feet of the victim, from encouraging anyone else to commit hate crimes, and from violating the civil rights of anyone in the future—including a violation involving a different type of bias or victim. Thus, a defendant who has committed a hate crime based on race is enjoined from violating the civil rights of that person, anyone of the same race and anyone else protected by the statute. As used by the Maine Attorney General's Office, consent decrees are designed not only to stop the conduct directed at a single person but also at halting the offensive conduct in the community-at-large. If a consent decree is violated, the perpetrator can be prosecuted for the new hate crime as well as for violating the injunction.

The case of State v. Dow is illustrative of the type of hate crimes the Office prosecutes. In Dow, the defendant yelled racial slurs and threats, including “get out and I will beat your black ass, you nigger, you whore, you slut,” at a pregnant twenty-one-year-old African American woman. Dow then threw a can of beer at the woman, opened her car door, and kicked the woman in the arm and stomach. The Attorney General's Office entered into a consent decree with Dow where he agreed to be permanently enjoined from assaulting, threatening, intimidating, coercing, harassing or attempting to do any of these things to the victim, the victim's family or anyone else, whether the bias be motivated by race, religion, sex, etc. In addition, Dow is permanently enjoined from speaking to the victim and her family, and from coming within a certain number of feet of the victim's home or place of employment. If Dow knowingly violates the consent decree, he is liable for a fine of no more than $2,000 and no more

65 Id.
66 Id.
67 Id.
68 See Parr, supra note 57, at 210.
69 Id.
70 Id.
71 Harnett, supra note 63.
72 Id.
74 Id. at 3.
76 See id.
than 364 days in jail.\textsuperscript{77}

c) Education and Training

In addition to prosecuting offenders, the Maine Attorney General's Office has developed an educational program to prevent hate crimes and to educate citizens to recognize hate crimes.\textsuperscript{78} To reach students, school administrators and citizens, the Office conducts free presentations at schools and workplaces.\textsuperscript{79} In 2006, the Office conducted 144 of these presentations throughout the state.\textsuperscript{80} In addition, the Office works with middle and high schools across the states to create Civil Rights Teams, which are composed of a faculty advisor and three students per grade, who receive training about raising awareness of bias and prejudice at their schools.\textsuperscript{81} The goal of the Teams is to provide the student body with a support group of Team members to whom students can feel comfortable talking about harassment before it develops into a hate crime.\textsuperscript{82} Team members then pass this information on to school administrators or law enforcement officials who can take appropriate action.

The Maine Attorney General's Office also trains police officers about enforcing the Civil Rights Act. Each new recruit receives a basic amount of training in civil rights law while at the Maine State Police Academy.\textsuperscript{83} Additionally, most police departments have a “Designated Civil Rights Officer” who is specially trained to identify bias-motivated crimes.\textsuperscript{84} This Officer then works as a liaison with the Attorney General's Office to investigate and prosecute hate crimes.

iii. Massachusetts

a) Law

The Massachusetts Civil Rights Act was enacted in 1979 in response to a wave of racially motivated violence, which was particularly severe in Boston.\textsuperscript{85} The Act provides that:

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the

\textsuperscript{77} See id. at 3.

\textsuperscript{78} The educational program is unusually prominent in the Maine Attorney General's Office. In fact, the title of the Assistant Attorney General in charge of the Civil Rights Division is “Civil Rights Education and Enforcement Officer.” Harnett, \textit{supra} note 63.

\textsuperscript{79} Id. As this article will elaborate below, education in schools is especially important because most hate crimes are committed by teenage boys.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

peaceable exercise or enjoyment of the right or rights secured.\textsuperscript{86}

Because the Act does not enumerate the categories of people or rights protected, it has been interpreted broadly to apply to “race, ethnicity, religion, sexual orientation, gender, or disability...or participation in a protected activity (for example, voting, using public ways, attending school, associating lawfully with other people)[.]”\textsuperscript{87} However, this list is illustrative, rather than exhaustive. The Act notably does not provide for a victim to collect damages in a suit under the Act—merely for an injunction or equitable relief. If a victim wants to file a claim for damages, he or she must hire a private attorney. A violation of an injunction issued under the Act is a criminal offense, and the violation is punishable

by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both such fine and imprisonment; provided, however, that if bodily injury results from such violation, the violation shall be punishable by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.\textsuperscript{88}

b) Enforcement

The Massachusetts Attorney General's Office receives complaints of civil rights violations from both police and victims themselves. If the Office decides to pursue a case, it works with the local police department to investigate.\textsuperscript{89} If a victim does not want to testify, he or she may prepare a written statement under oath, which the Office can present to receive an injunction.\textsuperscript{90} Although there are no current data available regarding the annual number of civil prosecutions, from 1982 to 1989, the Office received “eighty-four injunctions against 233 defendants in hate-motivated violence cases” around the state.\textsuperscript{91}

A recent case illustrates how the Massachusetts Attorney General's Office is enforcing the Civil Rights Act. In 2005, the Office obtained an injunction against a woman named Sharon Brunelle who verbally assaulted four men—two of them gay—using anti-gay slurs and violent threats.\textsuperscript{92} According to the Office's complaint, Brunelle shouted anti-gay slurs at her downstairs neighbors, who were two gay men, as they ate dinner in their backyard.\textsuperscript{93} When another neighbor tried to intervene on behalf of the two men, Brunelle threatened to “kill and beat the two gay men, the next door neighbor and another man visiting next door” all while yelling anti-gay slurs.\textsuperscript{94} The injunction prohibits Brunelle from “threatening, intimidating or coercing any of the four male victims, or anyone else in the Commonwealth, on the basis of their actual or perceived

\textsuperscript{86} ALM GL ch. 12, § 11H (2006).
\textsuperscript{87} The Office of the Massachusetts Attorney General, \textit{The Massachusetts Civil Rights Act, available at: http://www.ago.state.ma.us/sp.cfm?pageid=1192} (last visited: 1/7/07) [hereinafter OMAG].
\textsuperscript{88} ALM GL ch. 12, § 11J (2006).
\textsuperscript{89} See OMAG, \textit{supra} note 87.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} Lee, \textit{supra} note 85, at 295.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
sexual orientation.”95 In addition, Brunelle must stay a minimum of fifteen feet away from the victims at home, 150 feet away from the victims elsewhere and 500 feet away from the victims' place of employment; not communicate with the victims in any way; not handle the victims' mail; not bang or make excessive noise at night; and to “stop imitating or using gestures of stereotypical gay male movements.”96

c) Education and Training

In addition to prosecuting hate crimes, the Office also works with students, teachers and school administrators to reduce and prevent hate crimes from occurring in schools. In 2004, the Office produced a brochure educating students about what constitutes a hate crime, harassment and discrimination, and telling students what they should do—and who to contact—if they believe they have been a victim.97 In 2006, the Office launched a pilot program in three school districts to reduce bullying motivated by bias. The program, called the Safe Schools Initiative, was created after attorneys in the Attorney General's Office, school administrators and parents noted an increase in the number of reports of bullying or harassment where the perpetrator used hateful language.98 According to an attorney in the Office's Civil Rights Division, bullying using “anti-Semitic, antigay and lesbian language” was pervasive.99 The Office is working with schools and community groups to “interview parents and students, convene focus groups, and collect statistics about the number and type of incidents that occur in each district to look for patterns and trends. Teachers, administrators, and other staff members will be schooled in the legal distinctions among bullying, harassment, and hate crimes.” In addition, schools in the program are required to report all incidents, regardless of severity.100

iv. New Hampshire

a) Law

The New Hampshire Civil Rights Act was enacted in 2000 as a result of the efforts of the New Hampshire Attorney General, who asked his Assistant Attorneys General to draft hate crime legislation when he came into office.101 The New Hampshire Civil Rights Act provides that:

All persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or

95 Id.
99 See id.
100 See id.
101 Telephone Interview with Anne Larney, Assistant New Hampshire Attorney General (Dec. 28, 2006) [hereinafter Larney].
trespass on property when such actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, gender, or disability. 'Threatened physical force' and 'threatened damage to or trespass on property' is a communication, by physical conduct or by declaration, of an intent to inflict harm on a person or a person's property by some unlawful act with a purpose to terrorize or coerce.\textsuperscript{102}

The Act further provides that it is a violation of the Act “for any person to interfere or attempt to interfere with the rights secured by this chapter.”\textsuperscript{103} The New Hampshire Attorney General may bring a civil action for an injunction whenever he or she has probable cause to believe that the Act has been violated.\textsuperscript{104}

As enacted, the Act differs from the one proposed by the Attorney General's Office in one major way. While most civil rights laws require the Attorney General's Office to prove the elements of their case with a preponderance of evidence, the New Hampshire Civil Rights Act requires the Office to prove their case with clear and convincing evidence.\textsuperscript{105} This language was inserted because the proposed Act faced considerable opposition in the Legislature, and its supporters were forced to make this compromise to get it passed.\textsuperscript{106} New Hampshire is the only state to place such a high burden on the Office, an especially difficult burden for hate crimes because of the uncertainty inherent in trying to prove a perpetrator's motivation.

b) Enforcement

The New Hampshire Attorney General's Office rarely brings suit under the Civil Rights Act. Since 2000, approximately three cases have been brought under the Act, two of which involved school children and one which involved an adult.\textsuperscript{107} The Attorney General's Offices does get a “fair number of complaints”—the majority of which come from the police, although some come from the victims themselves.\textsuperscript{108} When a complaint comes into the Office, a pair of assistant attorneys general will work on it with a police officer or school resource officer—a police officer working directly in the school—to investigate the incident.\textsuperscript{109} If the Office decides not to pursue a complaint, it is usually because the Office lacks the requisite amount of proof of bias, but infrequently it is because the victim is uncooperative.\textsuperscript{110} While the Act allows the Office to go forward without the cooperation of a victim, it usually will not, either out of respect for the victim's wishes or because without the victim's testimony there is insufficient evidence.\textsuperscript{111}

Two cases involving minors in school are illustrative of the Office's enforcement efforts.\textsuperscript{112} In the first case, several students committed a hate crime against another student based

\textsuperscript{102} RSA 354-B:1 (2006).
\textsuperscript{103} Id.
\textsuperscript{104} See RSA 354-B:2 (2006).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Larney, supra note 101.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. In only one case has the Office brought suit without the victim's cooperation, and in this case the hate crime occurred in the presence of a teacher and a school police officer. The Office did not need the student's testimony and actually kept the name of the victim confidential.
\textsuperscript{112} Although cases involving minors are sealed, attorneys in the Office may discuss their cases generally so that one can get a sense of how the Office prosecutes cases.
on racial animus. On the recommendation of the Office, the court issued an injunction against the perpetrators from committing future hate crimes and ordering them to write a paper on civil rights. In the second case, four to five middle school children followed a classmate home and beat him up because of his perceived homosexuality. All but one perpetrator entered into a consent decree with the Attorney General's Office, agreeing to stop the hateful conduct. The remaining perpetrator chose to go to court with the support of his parents, and an evidentiary hearing was held where the victim, the perpetrator and four classmates—not the co-perpetrators—testified. The judge issued a bench order enjoining the perpetrator from further hate crimes and ordering him to pay a fine, which he forbade the boy's parents from paying. In addition to the injunctions, all of the perpetrators were ordered to write a paper on civil rights, which they had to read in front of a school assembly.

c) Education and Training

Since the enactment of the Act, the New Hampshire Attorney General's Office has conducted three trainings on the law. Two of these trainings were conducted for police officers, and one was conducted for school administrators. In terms of public education, the Office issues a press release and works with the local paper to publicize any prosecutions, but there is no standing public education and outreach program in place.

v. New Jersey

a) Law

The New Jersey hate crimes law was enacted in 1993 and provides that “[a] person, acting with purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity, who engages in conduct that is an offense under the provisions of the 'New Jersey Code of Criminal Justice,' Title 2C of the New Jersey Statutes, commits a civil offense...” In addition, bias against persons because of their “gender identification” was recently added to the enumerated categories. If a person violates the law, the “Attorney General, as parens patriae, may initiate a cause of action...on behalf of any person or persons who have sustained injury to person or property as a result of the commission of the civil offense.” If the Attorney General shows by a preponderance of the evidence that a person has violated the law, the perpetrator is liable for compensatory and punitive damages, reasonable attorney fees and costs to the State and/or private attorneys,
injunctive relief to prevent further violations, and any additional appropriate equitable relief.\textsuperscript{124}

b) Enforcement

In order to more effectively prevent and prosecute hate crimes, the Attorney General created The Office of Bias Crime and Community Relations (OBCCR) in the Office's Division of Criminal Justice, which investigates and prosecutes hate crimes statewide.\textsuperscript{125} Law enforcement officials are required to notify OBCCR within twenty-four hours of any suspected hate crime, especially those involving violent crimes, possible police officers perpetrators, established hate groups and those with the potential to lead to large-scale unrest.\textsuperscript{126} It is OBCCR's goal that all hate crime investigations "be conducted in a timely fashion using all appropriate resources to rapidly determine the facts and circumstances surrounding each incident."\textsuperscript{127} To this end, the OCBBR provides guidance to law enforcement officials investigating hate crimes, requiring officers to "[e]nsure that a thorough and complete initial response and follow-up investigation [is] conducted as required by the facts and circumstances surrounding the suspected or confirmed bias incident, which includes providing for appropriate community relations activities and crime prevention programs."\textsuperscript{128}

Prosecution of hate crimes in the New Jersey Attorney General's Office is divided between two separate divisions. The Division on Civil Rights brings civil suits to protect and enforce anti-discrimination and harassment claims, the majority of which deal with public accommodations and workplaces.\textsuperscript{129} The Division on Criminal Justice, of which OCBBR is a part, brings criminal actions against people who have committed hate crimes.\textsuperscript{130} The Division on Civil Rights does not work with the Division on Criminal Justice or the OBCCR to bring suit for injunctive relief in the event of a hate crime. Because of this bifurcated organization, it appears that the Office rarely—if ever—uses the civil injunction provision to punish hate crimes. There have been no reported cases or press releases citing the statute within the last five years, and the Attorney General's website makes no mention of this option.\textsuperscript{131} It appears that the Office has either forgotten and chosen not to use this provision of the law.

c) Education and Training

Since 1988, the OCBBR has conducted trainings in investigating hate crimes for every incoming police recruit at the academy.\textsuperscript{132} OCBBR also requires the chief law enforcement officer to "conduct appropriate bias incident media relations and prepare accurate, timely public information news releases, as appropriate."\textsuperscript{133} Thus, even though the Office does not prosecute hate crimes using the civil provision, police officers and citizens are educated by the Office's

\textsuperscript{124} Id.
\textsuperscript{126} See id.
\textsuperscript{127} Id. at 4.
\textsuperscript{128} Id. at 5.
\textsuperscript{129} Meistrich, supra note 122.
\textsuperscript{130} Id.
\textsuperscript{132} See Farmer, supra note 125, at 8.
\textsuperscript{133} Id. at 6.
criminal prosecutions.

vi. Pennsylvania

a) Law

The provision in the Pennsylvania civil rights law establishing a civil right of action for hate crimes was enacted in 1990. The law provides that the district attorney or the Attorney General, “after consulting with the District Attorney,” may bring suit for injunctive or other equitable relief against a person who has committed the crime of ethnic intimidation.\footnote{134}{42 PA.C.S. § 8309 (2006).} Ethnic intimidation is defined as when a person commits a crime with malicious intent toward “the actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals[.]”\footnote{135}{18 PA.C.S. § 2710 (2006).}

b) Enforcement

Although it has the statutory authority, the Pennsylvania Attorney General Office brings few—if any—cases under the civil rights law. Instead, the Office refers complaints to the Pennsylvania Human Relations Commission, the District Attorney, or other state and federal agencies.\footnote{136}{See Website of the Office of the Pennsylvania Attorney General, Civil Rights Division, \textit{available at:}\ \href{http://www.attorneygeneral.gov/complaints.aspx?id=462}{http://www.attorneygeneral.gov/complaints.aspx?id=462} (last visited: 1/8/07).} In place of prosecutions, the Office focuses its efforts on assuming a “leadership role in the development of educational programs and the collection of information and to coordinate and intervene in actions arising from allegations and complaints of civil rights violations,”\footnote{137}{Id.} In this way, the Office's approach is similar to California's, where Assistant Attorneys General focus their efforts on policymaking rather than actual law enforcement.

vii. Vermont

a) Law

The Vermont Hate Motivated Crime Statute was drafted by the Vermont Human Rights Commission and the Attorney General's Office at a time when there was a sharp increase in the number of hate crimes.\footnote{138}{See Erik FitzPatrick, \textit{An Analysis of the Constitutionality of the Vermont Hate Motivated Crimes Statute in Light of the United States Supreme Court's Decisions in R.A.V. v. City of St. Paul and Wisconsin v. Mitchell,} 18 VT. L. Rev. 771, 792-3 (1994).} Based on the Anti-Defamation League's model legislation, the Vermont Attorney General considered the proposal “one of his top priorities for the 1990 legislative session...[because he] believed that the penalty-enhancement approach afforded criminal prosecutors a much needed weapon to aggressively pursue hate crimes.”\footnote{139}{Id. at 793-4.} As enacted the Statute provides that:

\begin{quote}
A person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual
\end{quote}
or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap as defined by 21 V.S.A. § 495d(5), sexual orientation or gender identity [is guilty of a hate crime].

For the purpose of enforcing the Act, the statute defines plaintiff as either the Attorney General or a private complainant. A victim suffering “damage, loss or injury” as a result of a hate crime may bring suit for “injunctive relief, compensatory and punitive damages, costs and reasonable attorneys fees, and other injury as a result of [the] conduct.” In contrast, the Attorney General may seek an injunction, a civil penalty of not more than $5,000, and costs and reasonable attorneys fees.

b) Enforcement

The Vermont Attorney General can assist victims who wish to seek injunctive relief on their own, or it may civilly prosecute perpetrators independently. When a victim wishes to proceed independently, the judge can, and sometimes will, recommend that the victim contact the Attorney General's Office, which will offer its help. In recent years, the role of the Attorney General's Office in enforcing the Statute has decreased because state prosecutors have begun to criminally prosecute hate crimes more quickly, including seeking a temporary restraining order. When awarded quickly, a temporary restraining order obviates the need for a civil injunction under the Statute. The Attorney General's Office plays a larger role in cases where the state prosecutor is proceeding slowly, where the evidence isn't clear cut, or where the victims approach the Attorney General's Office before a criminal prosecution starts.

In an average year, the Office conducts far more investigations into potential hate crimes than it brings to court. If the Office decides not to file a suit, it is commonly because there is no clear identification of the perpetrator, or the hateful actions do not rise to the level of a crime. Of the complaints investigated, the most common type of bias is race, followed by disability. In 2004, the last year for which there are statistics available, the Office received twenty complaints of potential hate crimes and investigated fifteen. Of those fifteen complaints, the Office brought one suit for an injunction, and assisted one parent seeking an injunction on behalf of her child. In 2003, the Office obtained injunctions in two cases, but, in 2005, did not bring a

145 Telephone Interview with Sandi Everitt, Assistant Attorney General for Civil Rights (Dec. 29, 2006) [hereinafter Everitt Interview].
146 Id.
147 Id.
148 Id.
149 Id.
151 Id.
152 Id.
In recent years, there have been an increasing number of school-based hate crimes. In response to this trend, the Vermont Legislature passed a new anti-harassment law in 2005, which requires school administrators to intervene before conduct escalates to the level of a hate crime. Perhaps as a result, in 2005 and 2006, the Office has investigated fewer hate crimes in schools. However, the Office continues to reach out to school administrators to make sure students know how to contact the Office in the event of a hate crime.

To date, all of the suits brought by the Office have resulted in a consent injunction at the hearing stage. These injunctions are confidential and usually include provisions mandating counseling, treatment and community service for the perpetrator, and in cases where the perpetrator is a minor, the record is sealed and protected. As a result, the Office does not publicize when it brings a claim. Although barred from disclosing the details of its prosecutions, the Office briefly discussed the two cases brought by the Office in 2004 in its report to the Legislature. In the first case, the Office obtained an injunction against an offender for a crime motivated by the victim's perceived sexual orientation. The Office also had a “successful enforcement action in the same case when the initial order was violated.” In the second case, the Office assisted a parent in filing an action on behalf of her child, who was the victim of a hate crime motivated by race. On her behalf, the Office obtained “an injunction against one individual and assisted in a mediated resolution of the case with a second offender.”

c) Education and Training

In addition to bringing cases, the Vermont Attorney General's Office also trains police officers on preventing, recognizing and investigating hate crimes. In 2004, the Office conducted two full-day trainings for all new police recruits at the Vermont Criminal Justice Training Council facility. A member of the Office's Civil Rights Unit also worked with law enforcement officials to develop a training program covering bias and diversity for all law enforcement personnel. In the community at large, the Office has conducted trainings for refugee and immigrant service providers and participated in diversity fori in schools throughout the state.

viii. West Virginia

a) Law

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153 Everitt Interview, supra note 145.
154 See Everitt Report, supra note 150, at 1.
155 See id.
156 Everitt Interview, supra note 145.
157 Id.
158 See Everitt Report, supra note 150, at 1.
159 Id.
160 Id.
161 Id.
162 Everitt Interview, supra note 145.
163 See Everitt Report, supra note 150, at 3.
164 See id.
165 See id.
The West Virginia Human Rights Act was amended in 1998 to allow the Attorney General to bring a civil action “[w]henever any person, whether or not acting under the color of law, intentionally interferes or attempts to interfere with another person's exercise or enjoyment of rights secured by this article or article eleven...of this chapter, by actual or threatened physical force or violence against that person or any other person, or by actual or threatened damage to, destruction of or trespass on property.”166 The categories of bias protected by the Act are “race, color, religion, sex, ancestry, national origin, political affiliation or disability,” which are listed explicitly in the Act, and any other categories of bias which the courts find to be protected under the broader Human Rights Act.167 In a civil action under this Act, the Office may seek an injunction or other equitable relief, a civil penalty of no more than five thousand dollars per violation, or both.168 If a person knowingly violates an injunction issued under this Act, he or she is subject to a fine of not more than five thousand dollars, imprisonment for up to a year in jail, or both.169

b) Enforcement

When the Act was first implemented, the state created a Hate Crimes Task Force, which is made up of state, local and federal agencies and organizations, including the West Virginia Attorney General's Office170 The Task Force's overarching goal is to prevent and respond to hate crimes using a multi-disciplinary approach with the support of all of its members.171 The Attorney General's authority to seek an injunction or civil penalty is part of this broader program. Since 1998, the Office has handled about a “handful of cases a year” and has obtained injunctions in a total of ten cases.172

A recent prosecution of a race-motivated hate crime is illustrative of the Office's enforcement efforts. In 2004, the Office brought suit against a man named Romie Dailey, who threatened and attempted to stop a biracial couple from moving next door to him.173 Dailey told the couple and others that “Ain't no niggers going to live there” and brandished a gun at them.174 Dailey also told Jim Scott, who was selling his house to the biracial couple, “I'm going to kick your nigger-loving ass.”175 After a hearing, the court entered a preliminary injunction, which Dailey later violated by assaulting Bryan Smith, the African American fiancé living next door.176 The parties entered into a consent decree which ordered Dailey to pay a fine of $500, enjoyed Dailey from committing further hate crimes against the victims or anyone else, contacting the victims, “using the term 'nigger' to refer to Bryan W. Smith. or the term 'nigger lover' to refer to

167 Id.
168 See id.
169 See id.
171 Id. at 1-2.
172 Telephone Interview with Paul Sheridan, Assistant West Virginia Attorney General (Dec. 18, 2006) [hereinafter Sheridan].
174 Complaint at 3, State v. Dailey, Civil Action No. 04-C-2248 (Cir. Cty. Ct. of Kanawha, Aug. 12, 2004).
175 Id.
Sharmin L. Kilgore [Smith's fiancée] or her family members[,]” and ordering Dailey to attend anger management classes. In addition, Dailey was permanently enjoined from returning to his “former” home or go within a quarter-mile of the couple's house, except to retrieve his personal possessions at a time arranged with the victims' attorney.

**c) Education and Training**

In addition to prosecuting hate crimes, Task Force members, including the Attorney General's Office, have trained police officers to recognize and respond to hate crimes; recommended that each police department appoint a Designated Civil Rights Officer who will receive additional education and work with other Civil Rights Officers across the state; educated teachers and administrators about how to prevent hate crimes in school; created Civil Rights Teams in schools made up of a group of students trained to engage their classmates in a dialog about hate crimes; created and publicized a Toll-free number to report hate crimes and get referrals; held community education sessions; and worked with the federal government to coordinate responses to hate crimes.

While the Task Force was very active when the law was first passed in 1998, it has become less so over time and now only minimally exists. The lapse in coordination with police departments has proven to be a major problem for the Attorney General's Office because of high officer turnover. New officers may not have been previously trained to look for hate crimes, and without this training, police officers may not remember to watch for a pattern of bias. Unlike other states where the Office has more cases than resources, the West Virginia Attorney General's Office is trying to figure out how to get more cases in the door. Assistant Attorney General Paul Sheridan believes that there are more actionable incidents than cases brought to the Office's attention, but victims and authorities are not contacting the Office.

Another issue affecting the efforts of the Office is implementing the Task Force's goal that each police department appoint a Civil Rights Officer. When the Task Force first advocated for these specialists, the Governor asked all police departments to comply. However, the Governor has direct control over state police officers—not county or city police departments, who do the majority of investigations. The departments are therefore free to disregard the Governor's request and are unaccountable to the Attorney General's Office. This lack of authority combined with the Task Force's neglect has resulted in fewer departments appointing a Civil Rights Officer, which may contribute to the paucity of cases reported to the Attorney General's Office.

**IV. Lessons and Recommendations for States Interested in Adopting Similar Legislation**

Despite differences in size and organization of state attorneys' generals offices, there are several common themes among the eight states. First, there is a ubiquitous use of consent decrees
and consent injunctions in place of proceeding through the entire adjudicatory process. This approach may be the result of economics; attorneys generals' offices tend to have thin resources and few staff members. When asked, assistant attorneys general in Maine and New Hampshire cited a lack of resources as one of the office's biggest hindrances to prosecuting more hate crimes. This isn’t to say that if attorney generals offices had unlimited resources that they would prosecute every case to judgment. The issue is that assistant attorneys general need enough resources to prosecute cases quickly and move on to the next one.

Another explanation for the common use of consent decrees may be that perpetrators are often unrepresented by attorneys, whether because they cannot afford an attorney or choose not to hire one, and want to settle as soon as possible. Relatedly, it is possible that the social stigma of being a hate crime offender is strong enough that perpetrators prefer to settle, rather than have their conduct be a matter of public record. This justification is especially strong in the states that routinely agree to keep consent agreements confidential, such as Vermont. Whatever the reason, the result of the attorneys general's focus on consent decrees is a faster resolution for the victim—ensuring that they and others will not be future victims of hate crimes.

The second trend relates to the content of consent decrees and consent injunctions. In many states, offices use boilerplate language that generally prohibits future violations and protects the victim from the perpetrator. Use of boilerplate language allows offices to spend less time on each case, better spreading around scarce resources. Several states have also incorporated creative requirements into their decrees, such as writing a paper and completing anger management training. These “educational” requirements have the potential to prevent future hate crimes in a way that an injunction or a fine could not.

The third commonality is the increasing number of hate crimes committed by minors in schools and the community at large. The average perpetrator of a hate crime in nearly every state is a white teenage boy. Recognizing the danger that these teenagers represent for the future, several states have started programs to train school administrators to recognize and deal with hate crimes and harassment that can lead to hate crimes. Several states are also trying to educate students directly by conducting training in schools about hate crimes. Many attorneys general hope they can prevent a lifetime of hate-filled conduct by early intervention.

The final trend is that attorneys generals' offices are focusing on education, training and publicity, in addition to bringing suit. Most attorneys general's offices conduct trainings for local police officers to learn to recognize and investigate hate crimes. As noted above, discovering evidence of bias can be difficult if there is no physical evidence. Training police officers to ask the correct questions and to be sensitive to the personal issues of hate crime victims will increase the number and quality of cases an office can bring. Attorneys general’s offices commonly reach out to the public, both to educate and publicize pending cases. In several states, assistant attorneys general will travel to offices and rotary clubs to conduct trainings for the public on how to recognize and prevent hate crimes. When the office decides to file a claim, most offices work with the media to publicize the details of the incident and any punishment in the hope it will educate and deter future crimes. This approach seems to be effective because those states, such as Maine and Massachusetts, who publicize the activities of their Offices receive far more complaints than those, such as West Virginia and New Hampshire, that do not.

On balance, the unique institution of the attorney general seems well-suited to prosecute hate crimes because of its ability to use precious resources as efficiently as possible and to combine prosecutions, education and publicity to accomplish a broad policy goal.
V. The Constitutionality of Hate Crime Injunctions

Having examined how the eight attorneys general offices use their authority to civilly prosecute hate crimes, this article now explores whether the use of injunctions by attorneys general offices is unconstitutional in some or all instances. Specifically, this section will address whether the hate crime laws are a permissible regulation of speech and conduct under the First Amendment. It first examines the laws under the Supreme Court’s decisions in *R.A.V. v. City of St. Paul*, 184 *Wisconsin v. Mitchell*, 185 and *Virginia v. Black*, 186 which established the Court’s jurisprudence in this area. The section then focuses on whether the use of injunctions for civil rights enforcement is an unconstitutional prior restraint on free speech. Lastly, this section explores the extent to which the government can enter into an agreement with a defendant to enjoin future conduct under the unconstitutional conditions doctrine.

A. May States Enact Laws that Specifically Target Hate Crimes?

In 1992, the Supreme Court first considered the constitutionality of hate crime legislation under the First Amendment in *R.A.V. v. City of St. Paul*. 187 This case involved a St. Paul ordinance that made it a crime to use any speech that could reasonably arouse anger or resentment in others on the basis of race, color, creed, religion or gender. 188 The Court held that the statute was facially unconstitutional because it prohibited speech solely on the basis of the viewpoint expressed. 189 However, the Court drew a distinction between content-based and viewpoint-based discrimination, noting that while viewpoint-based discrimination is always unconstitutional, there are certain types of content-based restrictions that have long been recognized as constitutional. 190 Thus, content-based discrimination is permissible when the speech at issue is part of a class of speech that is normally proscribable, and the discrimination is based on the “very reason the entire class of speech at issue is proscribable.” 191 As an example, the Court noted that a state could prohibit only the most offensive obscenity, but it could not prohibit only the most offensive political obscenity. 192 On this basis, the Court held that the St. Paul statute was unconstitutional because it applied only to fighting words that insult or provoke violence because they express a view on a “disfavored subject.” 193

Although the *R.A.V.* Court struck down a law which criminalized speech based on its hateful viewpoint, the Court shortly thereafter upheld a law increasing a criminal penalty where the victim was chosen because of a personal characteristic in *Wisconsin v. Mitchell*. 194 This case involved a Wisconsin statute which increased the penalty for a crime where the victim was selected because of their “race, religion, color, disability, sexual orientation, national origin or

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187 505 U.S. at 377.
188 See id. at 379.
189 See id. at 382.
190 See id. at 387-8.
191 Id. at 388.
192 Id.
193 Id. at 391.
194 508 U.S. at 476.
ancestry....” Mitchell, an African-American defendant, was convicted of beating a white man and received a sentence enhancement under the statute, which he challenged. The Court upheld the enhancement and distinguished R.A.V. on the grounds that the statute there was directed expressly at expression, and the Wisconsin law was directed at conduct unprotected by the First Amendment—here, physical assault. Moreover, the Court noted that the state singled out hate crimes because they are thought “to inflict greater individual and societal harm.... [B]ias-motivated crimes are more likely provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” The Court, therefore, held that the state had an adequate justification for its penalty-enhancing provision in order to redress these harms.

Taken together, R.A.V. and Mitchell hold that while states may enact laws that punish bias-motivated crimes more than those that are not, they may not enact laws that punish otherwise non-criminal speech. Thus, if the states’ laws are constitutional, it must be because civil penalties for criminal acts are analogous to the criminal penalties in R.A.V. This analogy seems especially appropriate because every state, excluding possibly New Jersey, provide that a violation of a hate crime injunction is a crime. Additionally, the Court's rationale in Mitchell that a penalty-enhancement statute was constitutional because it focused on conduct rather than expression is equally applicable. The laws cited above follow two general models. The first model generally prohibits damage or trespass to property and the use of physical force or violence against a person when motivated by hatred. The second model prohibits threats, intimidation, and coercion intended to prevent a person from enjoying or exercising their constitutional rights. The first model is an easier fit with the jurisprudence of R.A.V. and Mitchell and is, therefore, likely constitutional.

Because second model laws regulate speech rather than conduct, their constitutionality is much more questionable than the first model. The Supreme Court has long recognized that there are certain types of speech, including insulting or fighting words, that may be prevented and punished without offending the First Amendment. Over time, the Court has limited the fighting words doctrine to allow regulation only of “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” In the context of hate crimes, R.A.V. creates an additional restriction that a statute punishing or prohibiting fighting words may not be limited to certain types of fighting words, such as racial epithets. There, the Court held that “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message

195 Id. at 481-2 (citing Wis. Stat. § 939.645 (1989-1990)).
196 Mitchell, 508 U.S. at 479-480.
197 See id. at 487.
198 Id. at 487-88.
200 See, e.g., W. Va. Code § 5-11-20(a) (2007) (providing that a person has the right to engage in lawful activities without being subject to violence or damage to property).
202 See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942) (“There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).
203 Cohen v. California, 403 U.S. 15, 20 (1971); See also Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (“[F]ree speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).
expressed.” 204 The first question, therefore, is whether threats, intimidation, and coercion qualify as fighting words. As a subset of fighting words, the Court has consistently held that states can proscribe “true threats.” 205 As articulated in Virginia v. Black, a true threat “encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 206 In Black, the Court upheld a Virginia statute banning cross-burnings with the intent to intimidate, reasoning that intimidation is a type of true threat because intimidation places the hearer in fear of bodily harm or death. 207 One can use this reasoning to place coercion into the category of true threats or fighting words, but only to the extent that coercion intimidates the hearer into doing something against her will because she fears bodily harm. With that proviso, the second model laws discussed above can be understood to regulate fighting words.

Having determined that the second model laws regulate fighting words, the next question is whether they permissibly do so. As discussed above, the Court in R.A.V. invalidated a Minnesota law that prohibited fighting words—specifically cross burnings and Nazi swastikas—where the person should have reasonably known it would cause alarm in a person based on “race, color, creed, religion or gender[,]” 208 The Court distinguished the cross burning in R.A.V. with Black because it didn't matter in Black what reason the perpetrator had for trying to intimidate the victim. 209 Therefore, if the second model hate crimes laws enumerate protected classes, they are likely unconstitutional. The California Civil Rights Act does not contain a list of protected classes within its text, but the Legislature submitted contemporaneous findings that enunciate the Legislature's intent that it protect certain classes of people. 210 As these findings are non-binding and severable, the California statute is likely constitutional on its face. Similarly, the Massachusetts Civil Rights Act also lacks a list of protected classes within its text. 211 The Massachusetts Attorney General's Office has interpreted its law to apply to “race, ethnicity, religion, sexual orientation, gender, or disability...or participation in a protected activity (for example, voting, using public ways, attending school, associating lawfully with other people)[,]” 212 This determination by the Office could lead to an attack on the Act as applied but would not invalidate the statute completely. It is, therefore, likely constitutional. The New Jersey hate crimes law, on the other hand, punishes those who intend to intimidate people or engage in criminal conduct “because of race, color, religion, gender, handicap, sexual orientation or ethnicity...” or their victim. 213 This is similar to the statute struck down in R.A.V., and to the extent it criminalizes intimidation of certain groups of people, it is likely unconstitutional. If the intimidation language can be severed from the law, the provision allowing for punishment of criminal conduct motivated by hatred of a characteristic is similar to the first model of laws and would likely be held constitutional.

204 R.A.V., 505 U.S. at 386.
205 See Watts v. United States, 392 U.S. 705, 708 (1969); See also R.A.V., 505 U.S. at 386 (“Threats of violence are outside the First Amendment.”).
207 Id. at 360 (conviction reversed on other grounds).
208 R.A.V., 505 U.S. at 379.
209 Black, 538 U.S. at 362.
On balance, the hate crimes laws enacted by the eight states examined in this article—
with the possible exception of New Jersey—are likely constitutional attempts by states at
preventing and proscribing hate crimes. The Court's decisions in *R.A.V.*, *Mitchell*, and *Black*
make clear that hate crime penalty-enhancing laws and content-neutral regulations of fighting
words are constitutionally permissible.

**B. Are Hate Crime Injunctions an Unconstitutional Prior Restraint?**

As discussed above, hate crime laws that allow state attorney generals to civilly prosecute
those who commit criminal acts motivated by bias are constitutional. The more difficult question
is to what extent the attorney general and courts may enjoin a perpetrator from future actions.
Because most hate crimes involve speech elements as well as actions, injunctions crafted by
courts necessarily regulate both. However, Supreme Court jurisprudence has long recognized a
strong presumption against prior restraints on speech, which mandates that courts be very careful
in tailoring injunctions.

The Supreme Court established the general presumption against prior restraints on speech in *Near v. Minnesota*, where the Court struck down a permanent injunction against publication of
a newspaper.214 The Court held that the prohibition against prior restraint applies in all but
exceptional cases, such as where national security is at risk.215 Because injunctions are prior
restraints, they are, therefore, presumptively unconstitutional when applied to speech. However,
the Court has also held that not all speech injunctions are impermissible.216 Injunctions will
stand up to First Amendment scrutiny if the order is “based on a continuing course of repetitive
conduct[,]...is clear and sweeps no more broadly than necessary,” and has not gone into effect
before the court has determined that the conduct in question is illegal.217 The requirements for
injunctions on speech enunciated in *Pittsburgh Press Co.* operate to limit speech injunctions to
situations where the court has had a chance to hear evidence and is in a better position to craft an
appropriately narrow injunction on a case by case basis.218

Under *Near* and its progeny, hate crime injunctions like those discussed in this Article
run into constitutional problems only to the extent they regulate speech independent of action.
For example, in the West Virginia case of *State v. Dailey*, Dailey was enjoined from committing
future hate crimes against anyone, contacting the victims, “using the term 'nigger' to refer to Bryan W. Smith or the term 'nigger lover' to refer to [Smith's fiancee] or her family
members[,]”and ordering Dailey to attend anger management classes.219 While the injunction
was, in fact, based on a continuing course of conduct because Dailey had violated previous
injunctions, the requirements that Dailey not use the terms 'nigger' or 'nigger lover' likely sweep
more broadly than necessary to ensure that Dailey commit future hate crimes, thus failing the
*Pittsburgh Press* test.220 One can easily imagine a case where Dailey could commit a hate crime
without using any offensive speech, or a situation where he uses offensive speech, resulting in no

214 See 283 U.S. 697 (1931).
215 See id. at 715-16.
217 Id.
218 This narrow and careful tailoring is important given the collateral bar rule's requirement that a party obey a
court order until the court has invalidated it, or the party loses the chance to challenge the order. See United
219 Consent Decree, State v. Dailey, Civil Action No. 04-C-2248 (Cir. Cty. Ct. of Kanawha, Aug. 22, 2006).
220 See Pittsburgh Press Co., 413 U.S. at 390.
hate crime. Furthermore, the Near Court established a very narrow window in which speech injunctions are constitutional, and hate speech does not threaten national security or present any great danger of the type contemplated by the Court.\footnote{Near, 283 U.S. at 715-6.} Finally, the injunction runs afoul of the Court’s decision in \textit{R.A.V.} because a person cannot be punished solely for using racial epithets.\footnote{R. A. V., 505 U.S. at 381.} A prosecution for a violation of an injunction prohibiting speech protected under \textit{R.A.V.} would therefore be unconstitutional.

From \textit{Dailey}, it is clear that courts and attorneys general face a perhaps impassible obstacle in regulating hate speech through injunctions. The Court’s jurisprudence places such a high presumption against prior restraints on speech that one would be hard pressed to think of a situation where the prohibition would survive \textit{Pittsburgh Press, Near} and \textit{R.A.V.}. Therefore, unless the court can tie a speech action to a specific crime, such as threatening or coercing someone, injunctions on hate speech will likely be struck down as unconstitutional.

In the school context, however, the Supreme Court has traditionally allowed greater regulation of speech. While students do not “shed the constitutional rights to freedom of speech or expression at the schoolhouse gate,”\footnote{Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506, (1969).} the First Amendment rights of public school students “are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.”\footnote{Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal citations and quotations omitted).} Therefore, school officials may punish and prevent speech in ways that public officials in other fori cannot.

Interpreting the Supreme Court’s jurisprudence, many courts have held that:

1. If the speech involved is lewd, vulgar, or plainly offensive, then school officials may censor it no matter where, when, or how it occurs; (2) if the speech is school-sponsored, then school officials have broad discretion to regulate it as long as regulations are related to legitimate educational concerns; and (3) all other speech is protected and school officials may not censor it unless they can show the speech has or will cause a material and substantial disruption.\footnote{See Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992); Castorina v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000).} Schoolyard hate speech can come under either the first or third category because it is both offensive and may cause a substantial disruption.

The problem with classifying hate speech as offensive is that enforcement often runs afoul of the general rule against viewpoint discrimination. For example, school officials attempting to stop students from wearing shirts saying “Gays are evil” may be accused of promoting a pro-gay, anti-Christian message. The Supreme Court has not ruled on whether school officials may engage in viewpoint discrimination, and circuit courts are divided on the issue.\footnote{The Seventh and the Ninth Circuits have held that viewpoint discrimination by school officials is permissible. See Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1542 (7th Cir. 1996); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006). The Second and Eleventh Circuits have held that school officials must be viewpoint neutral. See Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 633 (2d Cir. 2005); Holloman v. Harland, 370 F.3d 1252, 1279-1280 (11th Cir. 2004).} As a result, many courts determine First Amendment challenges to student hate speech
using the third category. For example, the Tenth Circuit upheld a school district rule prohibiting students on school property from “wear[ing] or hav[ing] in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred.”\(^{227}\) The Court rejected the student’s challenge, stating that where school officials believe that a student’s expression might “‘substantially interfere with the work of the school or impinge upon the rights of other students,’” they may forbid such expression.\(^{228}\) However, school officials may not prohibit speech based purely on speculation and fear that it may cause a disruption.\(^{229}\) School officials must draw from evidence where they could reasonably conclude that the challenged speech would likely lead to a material and substantial disruption.\(^{230}\)

Thus, students may be prevented from or punished for speaking in instances where adults in other fora may not. Where a student commits a hate crime or is found to have used hate speech, public or school officials may enjoin and punish the student as long as there is evidence that the speech will cause a material and substantial disruption. The court may use history of past disruptions as evidence or may take as judicial notice that some types of speech, such as racial slurs, are \textit{per se} disruptive. As a result, an attorney general’s office will face far fewer constitutional restrictions in crafting injunctions for students than for adults.

\textbf{C. When Do Consent Decrees Impose Unconstitutional Conditions}

In most hate crime cases brought by attorneys general offices, the offices come to an agreement with the defendant on a set of prohibitions on future conduct, rather than proceeding through the full adjudicatory process. In these consent decrees, defendants agree to cease their hateful conduct and sometimes to undergo some sort of therapy or counseling. While consent decrees contain many of the same conditions and terms that courts put into injunctions, the analysis of their constitutionality turns on slightly different grounds because the defendant is entering into a quasi-contract with the government. The question, therefore, is to what conditions the defendant is allowed to agree and what rights he may waive. The doctrine of “unconstitutional conditions” broadly holds that the government may not offer anyone “a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or to refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification.”\(^{231}\) In practical terms, the doctrine of unconstitutional conditions forbids the government from doing indirectly what it cannot do directly. Thus, generally the court may not allow the government to impose conditions on a defendant in consent decree that it could not impose in an injunction.

When applying the doctrine of unconstitutional conditions to government action, the Supreme Court has drawn a distinction between what it calls penalties for exercising a right and

\(^{227}\) West, 206 F.3d at 1361.
\(^{228}\) \textit{Id.} at 1366 (citing Tinker, 393 U.S. at 509). \textit{See also} Harper, 445 F.3d at 1178 (“Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”).
\(^{229}\) \textit{See} Tinker, 393 U.S. at 508.
\(^{230}\) West, 206 F.3d at 1366. \textit{See also} D.B. v. Lafon, 217 Fed. Appx. 518, 523 (6th Cir. 2007) (“Even without evidence that Confederate flag displays had been the direct cause of past disruptions, school officials reasonably could surmise that such displays posed a substantial risk of provoking problems in the incendiary atmosphere then existing[].”)
a mere refusal to subsidize the exercise of a right.\footnote{232}{See id. at 1420.} While the latter is allowed, the former must meet a higher standard of review to escape invalidation. For example, in \textit{Regan v. Taxation With Representation of Washington}, the Court upheld a ban on lobbying for tax-exempt organizations on the basis that the government could choose not to subsidize lobbying.\footnote{233}{See \textit{Regan v. Taxation With Representation of Washington}, 461 U.S. 540, 542 (1983). See also \textit{Rust v. Sullivan}, 500 U.S. 173, 198 (1991) (holding that the federal government could refuse to give federal funds to family planning organizations that offered abortion-related information and services).} Although the Court's jurisprudence in this area is not a model of clarity, it seems as though in order for a penalty to survive a constitutional attack, the government regulation must be "narrowly tailored to serve a substantial governmental interest."\footnote{234}{FCC v. \textit{League of Women Voters}, 468 U.S. 364, 380 (1984).} Therefore, the Court held that an FCC regulation banning all editorializing from government subsidized public television stations was an unconstitutional condition because the ban was overbroad relative to the government's interest in disavowing association with editorial content.\footnote{235}{See id. at 393.}

In the context of criminal law, the Court has interpreted broadly what qualifies as a benefit. For example, the Court has held that a plea bargain is a benefit, either to receive a lesser sentence\footnote{236}{See \textit{Brady v. United States}, 397 U.S. 742, 752-753 (1970).} or to escape criminal liability completely.\footnote{237}{See generally \textit{Newton v. Rumery}, 480 U.S. 386 (1987).} Hate crime consent decrees are very similar to plea bargains in that the defendant benefits from not going through the adjudicatory process in favor of a definite and immediate outcome. Courts would, therefore, likely treat consent decrees like plea bargains and hold that they are benefits. In order to receive this benefit, the Supreme Court has held that defendants can only waive constitutional rights if the waiver is the product of an informed and voluntary decision.\footnote{238}{See \textit{id. at 393.}}

In terms of which constitutional rights are waiveable, the Court has been more willing to allow defendants to waive rights related to trial, such as to appeal\footnote{239}{See \textit{Brady}, 397 U.S. at 752-753.} and to file a federal claim\footnote{240}{See \textit{Newton}, 480 U.S. 386.} than rights which are unrelated or "not germane" to the benefit offered.\footnote{241}{\textit{See Nollan v. California Coastal Commission}, 483 U.S. 825, 836-8 (1987).} Therefore, an attorney general’s office would have to show that an agreement, for example not to say the word 'nigger' in the \textit{Dailey} case above, is germane to the benefit offered. Given that these consent decrees are created in the course of hate crime prosecutions, it is likely that a court would find the agreement not to use such language is germane. After all, reducing the likelihood that a future hate crime will be committed is relevant to how severe an accused should be punished.

\section*{VI. Recommendations for States Interested in Enacting Similar Legislation}

This Article recommends that every state enact legislation allowing their state attorney general to seek injunctive and equitable relief when a hate crime has occurred based on the many benefits to victims and communities discussed in this paper. These benefits include faster awards of injunctions; injunctions awarded in cases where the private victim would otherwise be unable to secure private counsel; increased media attention because of the state's involvement and press activities; potentially lower burdens of proof; and higher rates of success because of the assistant

\addcontentsline{toc}{section}{References}

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  \item \footnote{232}{See \textit{id.} at 1420.}
  \item \footnote{233}{See \textit{Regan v. Taxation With Representation of Wash.}, 461 U.S. 540, 542 (1983). See also \textit{Rust v. Sullivan}, 500 U.S. 173, 198 (1991) (holding that the federal government could refuse to give federal funds to family planning organizations that offered abortion-related information and services).}
  \item \footnote{234}{\textit{FCC v. League of Women Voters}, 468 U.S. 364, 380 (1984).}
  \item \footnote{235}{See \textit{id.}}
  \item \footnote{236}{See \textit{Brady v. United States}, 397 U.S. 742, 752-753 (1970).}
  \item \footnote{237}{See generally \textit{Newton v. Rumery}, 480 U.S. 386 (1987).}
  \item \footnote{238}{See \textit{id.} at 393.}
  \item \footnote{239}{See \textit{Brady}, 397 U.S. at 752-753.}
  \item \footnote{240}{See \textit{Newton}, 480 U.S. 386.}
  \item \footnote{241}{\textit{See Nollan v. California Coastal Commission}, 483 U.S. 825, 836-8 (1987).}
\end{itemize}

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attorney general's expertise.

There are, however, pitfalls that states have encountered, which future states should endeavor to avoid. First, it is important to work closely with police officers to identify and investigate possible hate crimes. In the Maine case discussed in the Introduction, a Lewiston police officer (if you believe the perpetrator's story) incorrectly informed the perpetrator that he would only be guilty of littering if he threw the pig's head into a mosque. Law enforcement officers should receive hate crime trainings on a routine basis because if they don't recognize the signs, hate crime doesn't exist. Second, it is important to keep publicizing prosecutions and advertising the attorney general's resources to the public. As an example, the West Virginia Attorney General's Office has had a decreasing number of complaints—even though it knows hate crimes are occurring—because fewer victims know to contact the Office. This is the result of almost no outreach to the public, an unpublished hate crime hotline, and fewer trainings for police officers or school officials in recent years. Because so many prosecutions by the attorney general's office occur in cases where the victim is otherwise unable to seek relief, it is important for the Office to advertise its availability to these victims.

In addition to statutory language, states should also take into consideration the enforcement lessons learned by the eight states with operating programs. First and most importantly, the statute should explicitly provide the attorney general with the authority to proceed on the behalf of the victim to the same extent that the victim could proceed with a private attorney. For example, if the attorney general is unable to seek damages where a private attorney could, fewer victims will complaint to the office.

Second, the statute should specify the burden of proof, which is preferably a preponderance of the evidence standard rather than clear and convincing. The New Hampshire Attorney General's Office has had problems bringing hate crimes claims under their statute, which requires the higher burden of proof, because the evidence in many hate crimes is circumstantial and equivocal. The preponderance of the evidence standard appropriately balances the interests of the perpetrator in a fair trial with the reality of the difficult inherent in proving a hate crime.

Third, the statute should provide for several remedies including injunctions, attorneys fees, compensatory and punitive damages, and any other appropriate equitable relief. As the California Attorney General noted, without a financial incentive many victims will not report hates crimes to the Office, preferring to deal with the incident informally. In addition, an award of attorneys fees to the office can help reduce the financial strain under which many officers operate. The ability to seek punitive damages is also important because some hate crimes are incredibly heinous and offensive but do not result in significant property or personal damage.

Finally, the states discussed above have made great use of their ability to seek other types of equitable relief. Allowing attorneys general to order students to write papers or adults to undergo sensitivity training can help prevent future hate crimes in a way that an injunction cannot. In sum, a statute that incorporates these elements will be a powerful tool for attorneys general who want to become involved in reduce hate crimes in their states.

Unfortunately, enacting a statute is only half of the solution. As this Article previously discussed, a vital element of any successful hate crime program is education and training. In terms of education, attorneys general offices should work with schools, offices, community organizations and the press to educate citizens about what a hate crime is and what they should do if they are the victim of one. Because there have been an increasing number of hate crimes in schools, it is especially important to educate students about their liability and options under the
law. In terms of training, states should implement a program that mandates hate crime training for police officers during their initial training and on routine intervals thereafter. While it can be helpful to appoint a single officer to be in charge of recognizing hate crimes, it is the average police officer responding to a call in the community who is best positioned to recognize bias-indicators in an incident or a pattern of incidents. All officers must therefore understand how to recognize and investigate hate crimes. An attorney general's office that includes education and training in its program will, therefore, be far more successful in enforcing its hate crimes statute.

VII. Conclusion

State attorneys general can play a valuable role in preventing and punishing hate crimes by seeking injunctive and equitable relief. There are many benefits to giving the attorney general the authority to act on behalf of a hate crime victim, the most important of which is providing legal services to a person who may not be able to hire a private attorney. But there are additional benefits. For example, intervention by the attorney general can help bring publicity to a crime in a way that a private suit may not, increasing the public awareness of the prevalence of hate crimes and the concomitant penalties.

Experiences of the five states who are currently using this type of authority have been universally positive, if not perfect (California, New Jersey and Pennsylvania are excluded because they are not currently using their authority). The success of any hate crime program depends on the extent to which Offices can get cases in the door. As states have discovered, the keys to getting victims to bring their complaints to the attorney general's office are the ability to get damages, publicity of the office's capabilities and the law, and training police officers to recognize hate crimes when they occur. Attorneys general in other states who are looking for a way to reduce hate crimes in their jurisdiction would benefit from adopting such a program and should look to the experience of these states to craft their own program.